

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TYRONE KEYS

Plaintiff,

v.

BERT BELL/PETE ROZELLE
NFL PLAYER RETIREMENT PLAN
and the NFL PLAYER DISABILITY
& NEUROCOGNITIVE BENEFIT
PLAN

Defendants.

Case No.

8:18cv2098 T 36 JSS

2018 AUG 22 PM 1:10
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

FILED

PLAINTIFF'S COMPLAINT

Tyrone Keys seeks reinstatement of his NFL-related disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Disability & Neurocognitive Benefit Plan. These benefits, stopped in August 2017, have been paid to Keys since 2004 based upon the medical examinations and reports of multiple NFL Plan-appointed medical experts who examined him and found him disabled due to impairments caused by playing NFL football. Also, Keys seeks declaratory relief against the Plans preventing their administrators from clawing back benefits that have been paid to Keys.

I. PARTIES

1. Plaintiff, Tyrone Keys, is a resident of Tampa, Hillsborough County, Florida.
2. Defendant, Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan"), is a multi-employer pension and welfare benefit plan that can be served with citation by serving the NFL Retirement Board, Bert Bell/Pete Rozelle NFL Player Retirement Plan, 200 St. Paul St., Suite 2420, Baltimore, MD 21202-2040.

TSA-52655
\$400

3. Defendant, NFL Player Disability & Neurocognitive Benefit Plan (“Disability Plan”), is a multi-employer welfare benefit plan that can be served with citation by serving the Disability Board, NFL Player Disability & Neurocognitive Benefit Plan, 200 St. Paul St., Suite 2420, Baltimore, MD 21202-2040.

II. JURISDICTION AND VENUE

4. This lawsuit is a claim for disability benefits and declaratory relief under an ERISA welfare benefit plan brought under 29 U.S.C. §1132(a)(1)(B). This court has jurisdiction over these claims under 29 U.S.C. §1132(e)(1) of the Employee Retirement Income Security Act of 1974 (“ERISA”). Venue is proper in the Middle District of Florida, Tampa Division, in accordance with 29 U.S.C. 1132(e)(2) as the disability benefit payment obligations under the Plans are due to Keys at his home in Tampa, Hillsborough County, Florida.

III. STATEMENT OF FACTS

5. Keys played in the National Football League for seven seasons as a defensive lineman. He played from 1983 until he had to retire in 1989 due to football injuries to his back, knees, and shoulder. Although he had a three-year contract with the San Diego Chargers from 1989 to 1991, the Chargers terminated his contract due to his inability to play due to injuries. During his career, Keys played for the Chicago Bears, Tampa Bay Buccaneers, and the San Diego Chargers.

6. Shortly after his NFL career ended, Keys submitted a disability claim to the Plan administrators due to his significant football-induced impairments. At the time he submitted his initial disability claim, there were three relevant classifications of disability benefits: (i) Line of Duty Benefits, awarded to players who have a “substantial disablement” due to playing NFL football but who are considered not totally disabled; (ii) Football Degenerative Total and Permanent (T&P) benefits awarded to players who are considered to be substantially prevented

from engaging in any occupation, *i.e.* totally disabled, due to impairments caused by playing NFL football; and (iii) Inactive T&P Benefits, awarded to former NFL players who are found to be totally and permanently disabled but whose disability is considered to be unrelated to their NFL football careers.

7. The claims administrators for the Plan, the two groups deciding whether or not a player qualifies for one of the categories of benefits previously described, include the Disability Initial Claims Committee (“DICC”), an entity consisting of two people, one appointed by the NFL Players Association and one appointed by NFL management, and the Retirement Board (“Board”), consisting of six people, three appointed by the NFL Players Association and three appointed by NFL management.¹ Following ERISA’s requirement that a benefit claim made under a pension or welfare plan governed by ERISA receive an initial decision and then a full and fair review of any denial of benefits by a Plan fiduciary, the DICC is the initial decision maker and the Board members are the plan fiduciaries who conduct the fiduciary review of a claim that has been denied.

8. The Disability Plan has the same structure and the Disability Board consists of the same people who sit on the Retirement Board.

9. In 1991, Keys submitted a claim for Line of Duty benefits. Once Keys submitted his claim for Line of Duty benefits, the Plan’s administrators sent him to one of its top orthopedic physicians, Hugh Unger, M.D., for an evaluation.² Dr. Unger performed his first evaluation of

¹ The DICC and the Board, and the individuals who work in the Plan office, are sometimes collectively referred to as the Plan administrators.

² Skeptical of the opinions of treating physicians, the Plan administrators require players to have independent medical evaluations with Plan-approved physicians before awarding Line of Duty Benefits or Football Degenerative Benefits, unless players are approved as a result of a Social Security disability award. The NFL touts the Plan physician-experts that are involved in the Plan’s administrative process as being some of the best medical experts in the United States.

Keys on December 9, 1991, approximately two years after Keys' last season. Dr. Unger noted that Keys suffered a herniated lumbar disc and tore the meniscus of his right knee in 1989, his last season. Dr. Unger also noted that Keys sustained a cracked glenoid rim of his right shoulder while playing. By 1991, Keys had been through knee, back, and shoulder surgeries for NFL-related injuries.

10. After examining Keys in December 1991, Dr. Unger reported the following NFL-related impairments to the Plan's administrators, predicting that the impairments would degenerate further with time:

"Impression: Chondromalacia of the patella, bilateral
Degenerative arthritis of the right shoulder and
Glenolabrial disease
Osteoarthritis of the medial and lateral patellar facets
and of the medial femoral condyle
Status post foraminotomy and discectomy, L4 5"

11. Dr. Unger also evaluated the degree of Keys' NFL-related impairments. He reported that Keys had a 50-59% loss of use of his back as a result of playing in the NFL: a 30-49% loss of use of his shoulder as result of playing in the NFL: and a 60-79% loss of use of both knees as a result of playing in the NFL. In the additional remarks section of the report to the Board in 1991, Dr. Unger wrote as follows:

"This patient has multiple extremity involvements, with arthritis of the right shoulder, chondromalacia of both knees, and tear of the medial meniscus. It is anticipated that further degeneration in the right shoulder may develop in time and he may develop early arthritic changes in his knees."

12. The Board awarded Keys Line of Duty benefits based upon Dr. Unger's findings and opinions. Dr. Unger examined Keys annually at the Plan administrator's request up until 1999.

At each examination Dr. Unger found the same degree of NFL-related impairments: Keys had a 50-59% loss of use of his back; a 30-49% loss of use of his shoulder; and a 60-79% loss of use of both knees.

13. The Plan provides for Line of Duty benefits for a maximum period of five years. Keys was paid Line of Duty benefits for the maximum period. His Line of Duty benefits expired on December 1, 1997.

14. In 1996, Keys requested that his Line of Duty benefits be reclassified as T&P Football Degenerative disability benefits. The Board denied that request in 1997.

15. On May 7, 2002, Keys was involved in a minor automobile accident. His car was hit from behind while stopped at a red light. The accident aggravated his pre-existing professional football injuries but had no effect on the permanent injuries he sustained playing NFL football.

16. In September 2003, Keys re-applied for Football Degenerative T&P disability benefits. In his application, he listed his impairing conditions caused by playing NFL football. He relied upon the opinions of his treating physicians, an independent medical examination, and his medical history in attributing the following impairments to his NFL football career:

“Condition 1

I have unfortunately cervical spondylosis with upper extremity radicular symptoms referred to as radiculopathy. I am unable to sit for much more than 10 minutes without having to stand. I am unable to stand for more than 5 minutes without having to sit.

Condition 2

I unfortunately have significant spondylosis lumbar spondylosis with facet arthropathy at multiple levels & lower extremity radiculopathy. I am unable to complete a work day because of having to constant alternate between sitting & standing every few minutes to relive (sic) the pain. I herniated my lumbar in the last NFL game.

Condition 3

I unfortunately have degenerative joint disease chondromalacia & osteochondrel defect of the humeral and osteochondrel defect

of the humeral & osteochondral defect of the glenoid rim and degenerative tears of the glenoid. I am scheduled to begin pain management consultation next week. I landed on my shoulder & was never told that it was cracked by team doctors.

Condition 4

I have chondromalacia patella in both knees. I am unable to sit for more than 10 minutes without having to stand up to relieve the pain. I also cannot stand for more than 10 minutes because of the pain. I am to begin pain management consultation to include facet injection & associated trigger points and neural forarrminal (sic) injections.”

17. Thereafter, the Plan’s administrators sent Keys to one of their physician experts, Harold Selesnick, M.D. After an extensive physical examination, Dr. Selesnick found that Keys was disabled due to NFL football injuries. He wrote as follows:

“I believe that due to Mr. Keys’ chronic cervical and lumbar injuries, right shoulder limitation of motion, and pain and bilateral knee degeneration arthritis with limitation of motion and pain, that he is unable to work in any occupation for remuneration or profit. I believe that these limitations are permanent and he is likely to worsen with time to the point that he will eventually require bilateral knee replacements and possible right shoulder replacement surgery. I believe the cervical degenerative arthritis and lumbar degenerative arthritis will likely progress with time as well.”

18. After review of the application and the records that were submitted, Keys was awarded Inactive T&P disability benefits by the Board, effective January 1, 2004, at their meeting on March 3, 2004. Keys appealed, through counsel, pointing out that all of the medical evidence indicated that he was totally and permanently disabled due to his NFL football career.

19. After further review, and relying upon Dr. Selesnick’s examination and report, the DICC approved Keys’ claim for Football Degenerative T & P benefits at their meeting on April 7, 2004. This was a change in classification from his March 3rd award of Inactive T&P benefits. Football Degenerative T&P benefits were paid to Keys retroactive to January 1, 2004 and Keys repaid Inactive T&P benefits that he had received.

20. The Plan requires continuing proof of total and permanent disability once a participant is awarded benefits. Consequently, the Plan's administrators had their medical experts examine Keys multiple times. Each time, their experts found that Keys was totally disabled by his NFL career.

21. In April 2011, the DICC deadlocked (1 to 1) on whether Keys should receive ongoing T&P disability benefits as a result of a 2009 tax return. A DICC deadlock is a deemed denial under the Plan. Benefits were continued while Keys appealed the decision.

22. In May 2011, Keys was awarded Social Security disability benefits. The award was based upon Keys' orthopedic injuries from his NFL career leading to post-traumatic premature degenerative arthritis in his cervical and lumbar spine and knees.

23. Keys appealed the DICC's April 2011 decision to terminate his Football Degenerative disability benefits to the Board. He advised the Board that he had been approved for Social Security disability benefits but he had not received the award decision. His counsel provided a fee award from the Social Security (SS) Administration that indicated Keys had been approved for SS disability benefits. Under the Plan, a player will be approved for Plan disability benefits if he is approved for SS disability benefits, unless four or more members of the Board determine the player has received SS disability benefits fraudulently.

24. In August 2011, as a result of a collective bargaining agreement, the classification "Football Degenerative" T&P benefits was revised and those benefits were thereafter designated as "Inactive A" T&P benefits. "Inactive B" T&P benefits replaced the prior classification of "Inactive" T&P benefits. Keys received Inactive A T&P benefits in September, October, and November 2011 while his appeal was pending.

25. In November 2011, the Board upheld the DICC's April 2011 termination of benefits decision. The Board took the position that Keys' earnings stated in his 2009 tax return were incompatible with T&P disability benefits. The Board further alleged it received no evidence that Keys had been approved for SS disability benefits.

26. Keys reapplied for T&P disability benefits from the Plan in February 2012 and submitted the SS disability decision he had received by that time. The DICC denied his claim by letter dated March 5, 2012, maintaining that articles and documents he submitted with his application indicated that he was still working.

27. Keys appealed through counsel, pointing out that he performed limited charity work but did not have the capacity for full-time work due to his NFL-related impairments. Key's tax returns were submitted with the appeal, showing that he was not engaged in any full-time employment. At their meeting in November, 2012, the Board trustees awarded Inactive B (formerly "Inactive") T&P benefits to Keys, effective December 2011, based upon his re-application, his Social Security award, and his appeal.

28. Keys appealed the Board's decision, pointing out that the classification was wrong and that should have been awarded Inactive A T&P benefits. The Board trustees denied his appeal at their meeting in May 2013. Keys requested reconsideration. After reconsideration, the Board awarded Inactive A T&P disability benefits to Keys with an effective date of December 2013, subject to Keys providing additional information to the Plan administrators. Specifically, Keys was asked to provide authorizations allowing the Plan administrators to obtain Keys' Social Security disability files and his federal tax returns, along with a list of any employment Keys had been engaged in after January 2004. Keys was paid Inactive B benefits during this time period.

29. In February 2015, the Board terminated Keys' Inactive B T&P benefits, alleging Keys failed to provide the requested information. Counsel for Keys provided the information. In July 2015, Keys' Inactive A T&P benefits were reinstated retroactively to December 2013.

30. Keys, through counsel, wrote the Board, indicating that Inactive A T&P benefits should have been retroactively awarded to December 2011, not December 2013.³ Keys requested the difference between Inactive A T&P benefits and Inactive B T&P benefits for the period from December 2011 through November 2013.

31. In August 2017, the Plan administrators notified Keys that not only did the Board decide to deny his claim for additional benefits for the time period December 1, 2011 through November 2013, but also that the Board was terminating his Inactive A T&P benefits. Keys was notified that the Board trustees determined that he was never entitled to Inactive A T&P benefits, formerly Football Degenerative T&P benefits, and as a result, according to the Board, Keys was overpaid by \$831,488.28, alleged by the Board to be the sum of the difference between Inactive A (f/k/a Football Degenerative) and Inactive B (f/k/a Inactive) T&P benefits for the time period between January 1, 2004 until August 1, 2017. The Board notified Keys that he would no longer be paid any disability benefits and that his monthly Inactive B T&P benefits would be applied as they accrued to the outstanding indebtedness of \$831,488.28 allegedly to be due the Plan as a result of the alleged overpayment.

32. The Board notified Keys that when the Plan administrators reviewed Keys' SS file, they acquired a complete copy of a medical report from August 1, 2003, from Chet Janecki, M.D., that indicated Keys had been in a car accident in May 2002. The Board alleged for the first time

³ Disabled players classified as Inactive A receive greater monthly benefits than players classified as Inactive B.

that it had not received or acquired Janecki's full report before June 2016. The Board erroneously maintained that Keys' 2003 application for T&P Football Degenerative disability benefits was "intentionally and materially incomplete and inaccurate" because he did not provide the details of the 2002 car accident in his application. Further, the Board notified Keys that the car accident, rather than playing seven years in the NFL, was the "proximate cause of the impairments underlying (Keys) 2003 application" and, therefore, Keys was never entitled to Football Degenerative/Inactive A T&P benefits.

33. Keys appealed that determination, arguing that the longstanding impairments listed in his 2003 application were the result of playing NFL football, as was made clear by a reasonable review of his medical records. He pointed out that the car accident did not cause any of the NFL-related impairments he listed in his application, and that the ongoing award of benefits year after year by the Plan administrators, as well as the SS disability award, were based upon a significant volume of medical evidence that Keys remained totally and permanently disabled as a result of his NFL career. He also pointed out that the DICC knew about the 2002 automobile accident prior to the award of Football Degenerative T&P benefits in 2004.

34. The Board denied Keys' appeal by letter dated February 26, 2018. Keys was advised that he had exhausted his administrative remedies and his only remaining alternative was to file suit under §1132(a) of ERISA.

35. Keys has exhausted his administrative remedies as required by the Plans and by ERISA.

IV. CAUSES OF ACTION UNDER ERISA §1132(a)(1)(B)

Count I: Declaration of Rights Under the Plan Under §1132(a)(1)(B)

36. Keys seeks a declaration that the Board's decision that he owes the Plans due to an overpayment of benefits and that they have a right to offset the monthly disability benefits that would otherwise be paid to Keys in order to reduce that indebtedness was an abuse of discretion since Keys did not provide false information to either the Board or the DICC that led to an award of Plan benefits to which the Plans now contend he was not entitled.

Count II: Claim for Benefits Under §1132(a)(1)(B)

37. The Board's decision to deny Keys' claim for Inactive A T&P benefits for the time period from December 2011 through November 2013 was an abuse of discretion. In addition, the Trustees' decision to terminate Keys' Inactive A benefits beginning August 2017 was an abuse of decision. Keys accurately completed his 2003 application, relying upon the medical opinions of his physicians and an independent medical examination. The disabling impairments that he listed on the application, and for which the Board repeatedly found Keys disabled, were clearly the result of his seven-year NFL career, not the result of the May 2002 car accident, and Keys remains totally and permanently disabled as a result of impairments arising from his seven-year NFL football career.

38. In addition, by virtue of the Plan's own language, Keys was properly approved for Inactive A T&P benefits in November 2013 as a result of his Social Security disability award, since his application which led to the award of Inactive A benefits was submitted within a year of the prior termination of his Inactive A benefits. It was a clear abuse of discretion by the plan fiduciaries not to continue Keys' Inactive A benefits based upon his Social Security disability award.

Count III: Estoppel Based Upon Silence Under §1132(a)(1)(B)

39. In the disability application process under the Plan, a player is not required to submit any medical records if he does not seek retroactive disability benefits. Even so, a player may voluntarily submit his medical records. Since Keys was not seeking retroactive benefits, he was not required to submit any medical records. He did, however, voluntarily submit medical records that he believed supported the NFL-related impairments that he listed in his application for Football Degenerative T&P benefits.

40. After receipt of Keys' T&P application, dated September 13, 2003, the DICC sent Keys to its orthopedic physician Harlan Selesnick, M.D., who examined Keys in December 2003 and, after his clinical examination, opined that Keys was disabled as a result of impairments arising from his NFL football career.

41. In April 2004, and again in February and March 2005, the DICC reviewed Dr. Selesnick's report along with Keys' medical records that included a progress note from Dr. Shaker, one of Keys' treating physicians, who indicated that Keys had been in an accident in 2002 but that the imaging studies done prior to the accident revealed an abnormal degree of degenerative osteoarthritis in Keys' cervical and lumbar spine and knees, *i.e.* that the 2002 accident was not the cause of his significant orthopedic impairments.

42. Despite repeated claim reviews in which they had the information that Keys was involved in an accident in 2002, the DICC chose not to pursue any additional information regarding the 2002 automobile accident, either from Keys or Dr. Shaker, but proceeded to review the claims without any further inquiry concerning the accident and its potential effect on Keys' overall condition. This is not surprising considering 1) Keys' receipt of Line of Duty benefits for many years awarded shortly after the end of his NFL career with a finding that Keys had a 50-59% loss

of use of his back; a 30-49% loss of use of his shoulder; and a 60-79% loss of use of both knees as a result of his NFL career; 2) the volume of medical records prior to 2002 showing significant orthopedic impairments due to his NFL career, and 3) the fact that Keys had been thoroughly examined by an NFL Plan-appointed physician, Dr. Selesnick.

43. Subsequently, in 2008 and 2012, the six Board trustees reviewed Keys' entire file, which included the report of Dr. Shaker that discussed the 2002 accident. In 2017, over thirteen years after the DICC's initial approval of Football Degenerative T&P benefits, after multiple examinations by Plan-appointed physicians who found an NFL-related disability, and a finding of disability by the Social Security Administration, the Board trustees suddenly declared the Plan administrators had been duped by Keys when he applied for benefits in 2003 because he "fraudulently" withheld information about the 2002 car accident in his application.

44. The Board trustees are the appointed fiduciaries of the Plan and the Disability Plan, as required by ERISA. Their fiduciary duty towards plan participants such as Keys includes duties of honesty, good faith, fair dealing, and acting with care, skill, prudence and diligence. The Board members, acting on behalf of both the Plan and the Disability Plan, are 1) not being honest with Keys about the DICC's prior knowledge of Keys' 2002 accident when Keys was first approved for Football Degenerative benefits in 2004; 2) not being honest with Keys about DICC's conscious decision not to engage Keys in a dialogue concerning his 2002 automobile accident during the claims process in 2004 and 2005; and 3) not dealing honestly, fairly, and in good faith with Keys if the Board trustees now consider the DICC's, and later the Board's, decision not to engage in a simple dialogue with Keys about the accident a mistake; unilaterally blame Keys for that mistake; go so far as to accuse Keys of fraud; and seek to claw back his benefits based upon that false accusation of fraud.

45. The common law doctrine of estoppel based upon silence is a recognized equitable doctrine, and should be applied to the Board's decisions in 2017 and 2018 to claw back Keys' Inactive A benefits. The Board trustees clearly knew about the automobile accident, at the latest, in April 2008, and the DICC knew about the accident in April 2004. The Board should be estopped from its collection of alleged overpayment of benefits, an action initiated in 2017 and finalized in 2018, based upon an event that the DICC knew about in 2004. If the Plan administrators are now sincere in their belief that the 2002 accident contributed to the impairments Keys listed on his application for T&P benefits, they had an obligation when they learned about the accident, and during the claim and appeals process, to engage in a dialogue with Keys about the accident and its relationship to his listed impairments.

46. Keys has been substantially prejudiced by the DICC's and the Board's years of silence, as he was prevented from having a timely dialogue about the accident and its relationship to his condition. The Board should be estopped from clawing back benefits paid to Keys based upon an event that the Plan administrators knew occurred, but remained silent about, for thirteen years. These circumstances constitute extraordinary circumstances and are appropriate grounds to warrant the equitable relief of estoppel.

47. This claim is properly brought under §1132(a)(1)(B) of ERISA because it is a claim for benefits, more specifically, the retention of benefits paid.

V. RELIEF REQUESTED

Declaration of Rights Under the Plan Under 1132(a)(1)(B)

48. Keys seeks a declaration that the Board's decision that he owes the Plan for an overpayment of benefits was an abuse of discretion since he did not provide false information to

either the Board or the DICC that led to an award of Plan benefits to which he was not entitled. He seeks a finding that he did not provide false information to the Plans' administrators.

Claim for Benefits Due Under 1132(a)(1)(B)

49. In addition, Keys seeks Inactive A T&P benefits from the Disability Plan in the sum of \$144,000 (\$6,000 per month for 24 months) spanning the time period from December 2011 through November 2013, as Keys was paid Inactive B T&P benefits during that time period but should have been paid Inactive A T&P benefits. The final decision denying these additional benefits was made in August 2017, so this claim is made timely.

50. In addition, Keys is owed Inactive A T&P benefits from the Retirement Plan and Disability Plan from August 2017 to the present at the rate of \$9,000 per month (\$3,000 per month from the Retirement Plan and \$6,000 per month from the Disability Plan). As of August 2018, Keys is owed an additional \$108,000 in benefits due under the Plans.

Relief for Estoppel Claims

51. Keys requests that the Board be estopped from clawing back Inactive A T&P benefits paid to Keys based upon a minor 2002 automobile accident that the Plan administrators knew occurred, but remained silent about, for thirteen years. The circumstances surrounding the claw back of benefits are extraordinary and warrant relief in the form of equitable estoppel.

VI. ATTORNEYS' FEES

52. Keys prays for his attorneys' fees and costs under 29 U.S.C.A. 1132(g).

PRAYER

WHEREFORE, Keys prays for back benefits in the amount of \$252,000 as of August 1, 2018 plus Inactive A benefits that accrue after August 1, 2018 but while this case is pending in the amount of \$9,000 per month. He also seeks a declaration that he has not been overpaid by the Plan

administrators and therefore does not owe any reimbursement to the Plan. In addition, he prays for equitable relief, specifically equitable estoppel, to prevent the Plan administrators from clawing back Keys' Inactive A T&P benefits, as their years of silence regarding the accident was prejudicial to Keys. He also prays for his attorneys' fees, for pre-judgment interest at the maximum rate allowed by law, post-judgment interest, and for such other and further relief, both at law and in equity, to which he may show himself to be justly entitled.

DATED this 20th day of August, 2018.

Respectfully Submitted,



LANSE C. SCRIVEN, ESQ.
Florida Bar No. 729353
LANSE SCRIVEN LAW
lanse@LanseScriven.com
3903 Northdale Blvd., Suite 100e
Tampa, FL 33624
813/940-4000 (Telephone)
813/327-4828 (Facsimile)

--and--

JEFFREY DAHL, ESQ.
Texas State Bar No. 05310900
LAW OFFICE OF JEFFREY E. DAHL
405 N. St. Mary's Street, Suite 242
San Antonio, Texas 78205
210/527-0900 (Telephone)
210/527-0901 (Facsimile)
(*Pro Hac Vice* Application to Follow)

Attorneys for Plaintiff, Tyrone Keys